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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 674

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PETITIONER,

vs.

EFFIE K. SIMPSON, AS ADMINISTRATRIX OF THE ESTATE OF A. E. SIMPSON, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS AND BRIEF IN SUPPORT THEREOF.

HAROLD R. SMALL,
Counsel for Petitioner.

N. F. LAMB,
A. L. ADAMS,
Of Counsel.

(36,488)

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the St. Louis Southwestern Railway Company, a corporation, respectfully presents to this Court this, its petition for a writ of certiorari, addressed to the Supreme Court of the State of Arkansas, commanding said Court and the Clerk thereof to certify to this Court the record and proceedings of the case in that Court wherein your petitioner was appel-

lant, and Effie K. Simpson, as Administratrix of the Estate of A. E. Simpson, was appellee, together with the opinion therein, for review and determination of said cause by this Court.

Statement of Facts.

In this behalf your petitioner states the following facts:

This action was brought under the Federal Employers' Liability Act in the Circuit Court of Prairie County, Southern District of the State of Arkansas, for damages for personal injuries sustained by freight engineer A. E. Simpson and for his death (R. 1-4), with a resulting verdict and judgment for $28,000.00 (R. 10, 11).

The plaintiff's assignment of negligence on which recovery was had follows, the other assignments of negligence having been abandoned at the trial:

> "On account of the conduct of De Main, conductor upon said train, who carelessly, negligently and recklessly, after discovering the peril of the deceased, A. E. Simpson, failed to apply the air brakes from the rear and stop said train, thereby causing the train upon which deceased was riding to collide with another train operated by the agents, and servants of the defendant upon said main line, causing the deceased to receive injuries from which he thereafter died" (R. 3, 89).

The answer of petitioner denied the negligence alleged, and stated:

"Defendant says that the primary and only negligence resulting in said collision was that of said Simpson, in running and operating his train as he at the time well knew, in violation and disobedience of orders and directions given to him by defendant" (R. 6).

The undisputed evidence shows that Simpson, the engineer, was ordered by petitioner's Train Order 104 *to stop the train and keep it on the siding at McNeil, Arkansas, until Train No.* 18 *from the opposite direction had passed, and that notwithstanding this order he caused the train to proceed from the siding onto the main track, and at increased speed, until the head-on collision with Train* 18 *occurred, resulting in this death, the death of his two trainmen, the death of the engineer and fireman on Train* 18, *and in great property loss.*

Simpson was a locomotive engineer of a freight train running from Pine Bluff, Arkansas, *south* to Texarkana, Arkansas (R. 21, 98). On this occasion he left Pine Bluff early in the morning. His train was Extra 775 and being an extra was running under train orders, and not on schedule time under a time card, as regular trains do (R. 29, 98). Before leaving Pine Bluff he received *Train Order No.* 104, reading as follows:

"Eng. 775 run extra Pine Bluff shops to Texarkana yards, has right over No. 28 Eng. 779 Pine Bluff shops to Saline, right over No. 18 Eng. unknown to Pine Bluff shops to cross over McNeil" (R. 31, 98).

The words "has right over No. 28 Eng. 779, Pine Bluff shops to Saline" have no bearing in this suit.

Train No. 18 was a regular freight train running *north* from Texarkana to Pine Bluff, and being a regular train shown on the time card was referred to not as an "extra" but as "No. 18" (R. 98).

Pursuant to Train Order No. 104 *Simpson ran his train Extra No.* 775 *south to the cross-over at McNeil, Arkansas, and there went in on a siding where, in obedience to Train Order* 104, *he should have waited until No.* 18 *arrived and passed, at McNeil* (R. 43, 98). *This he did not do but ran in on the siding through McNeil and out onto the main line, without stopping, and collided with Train No.* 18 *about a mile south of McNeil* (R. 98), *five persons being killed in the collision* (R. 49, 99).

When passing through McNeil the conductor, De Main, and Simpson, engineer, each received Train Order No. 132, reading as follows:

> "Train Order No. 132, August 2, 1930, McNeill. To Extra 775, south. Second 18 Eng. 778 meet Extra 775 south at Stamps" (R. 35, 73).

This order was found in Simpson's pocket after the collision (R. 73, 98).

This order 132 did not authorize Simpson to leave the siding (R. 43, 98).

Order 104 remained in effect (R. 46, 98).

Second 18, mentioned in Train Order No. 132, which Simpson's train was directed to meet at Stamps, south

of McNeil, was also a northbound freight train, following No. 18.

The train orders were in usual and proper form (R. 44), and both the engineer and conductor had copies of all orders (R. 73). It was also the duty of the fireman and the head brakeman riding on the engine and the swing and rear brakemen riding in the caboose to know the contents of all train orders (R. 44). *Train orders may be modified or rescinded only by another train order* (R. 83).

There was a personal and primary duty on the engineer not to proceed with the train onto the main track, and the violation of this duty continued until the collision with Train 18 occurred.

The sole cause of the collision was the violation of petitioner's Train Order No. 104.

Recovery was allowed on the following evidence to support the last clear chance theory of respondent: De Main was conductor and Dorman and Craig were swing and rear brakemen of that train (R. 21). They were riding in the caboose. As the engineer Simpson ran the train out of the siding onto the main line at McNeil, Train Order No. 104 occurred to one or both of the brakemen (R. 25, 43, 98), and one of them said to conductor De Main "What have you got on No. 18?" (R. 25, 43.) The brakeman then proposed to stop the train by application of the air from the caboose. De Main told them not to do so but to bring him the orders. One of the brakemen went up into the cupola, got the orders, brought them to De Main, and

he was reading them when the collision occurred (R. 25, 26, 98).

It thus appears that conductor De Main did not "discover" any "peril" in the situation until then, when it was too late to do anything. Recovery was grounded and permitted, therefore, on the testimony of trainmen in the caboose at the rear of Simpson's forty-three car train, to the claimed but unproved effect that the conductor knew of the engineer's peril in time thereafter to have stopped his train, and stopped Train 18 from colliding with it.

Respondent plaintiff's instructions are based on the last clear chance theory (R. 85-91).

Petitioner defendant's instructions are to the effect that under the conceded facts no recovery could be had (R. 91-95).

Reasons Relied on for the Allowance of the Writ.

I.

The Arkansas trial and Supreme Courts erred in failing to follow controlling Federal decisions.

Recovery under the Federal Employers' Liability Act ought not to have been had where the fault of the employee, as here, is such that it would be a perversion of the act to allow recovery.

The negligence of engineer Simpson in disregarding Train Order 104 to stop and wait on the siding at McNeil and his running his train into collision a mile further on with opposing train No. 18, having the right-of-way on the main track, is such conduct as precludes,

under Federal controlling decisions, recovery for his injuries and death resulting from the collision.

His negligence is properly deemed the sole proximate cause of his injury and the doctrine of last clear chance on which recovery was allowed by the Arkansas courts on the theory the conductor, realizing the peril of the engineer, had time to stop *his* train, and so could have prevented the *two* trains from running into each other head-on has no place here.

Under controlling Federal decisions where there was a violation by the injured of like safety train orders with resulting collision it was held there could be no recovery even though there was also a failure of some other employee to perform his duty.

The following controlling Federal decisions construing the Federal Employers' Liability Act support the foregoing:

Great Northern Ry. v. *Wiles,* 240 U. S. 444;
Frese v. *Chicago, B. & Q. R. Co.,* 263 U. S. 1;
Davis v. *Kennedy,* 266 U. S. 147;
Yadkin R. R. Co. v. *Sigmon,* 267 U. S. 577 (186 N. C. 519, 120 S. E. 56);
Unadilla Valley R. Co. v. *Caldine,* 278 U. S. 139;
Virginian R. Co. v. *Linkous* (C. C. A., 4th), 230 Fed. 88;
Blunt v. *Pennsylvania R. Co.* (C. C. A., 6th 1925), 9 Fed. (2d) 395;
Unadilla Valley R. Co. v. *Dibble* (C. C. A., 2nd, 1929), 31 Fed. (2d) 239;
Southern Ry. Co. v. *Hylton* (C. C. A., 6th, 1930), 37 Fed. (2d) 843; certiorari denied 281 U. S. 745;

Bradley v. *N. W. Pac. R. Co.*, 44 Fed. (2d) 683 (C. C. A., 9th, 1930);
Paster v. *Pennsylvania R. Co.* (C. C. A., 2d, 1930), 43 Fed. (2d) 908.

Leading cases decided by the highest State courts are to the same effect:

Gillis v. *New York, N. H. & H. R. Co.* (Mass., 1916), 113 N. E. 212;
Davis v. *Payne* (Oregon, 1923), 216 P. 195;
Washington, B. & A. E. R. Co. v. *Cook* (Maryland, 1924), 125 Atl. 172;
Hudson v. *Norfolk & W. Ry. Co.* (W. Va., 1929), 146 S. E. 525; certiorari denied 279 U. S. 866;
Roberts Federal Liabilities of Carriers, 2d Edition, Vol. II, Sec. 874, page 1709.

II.

Where an engineer violates a stop and wait order of his employer railroad company and collision, with injury or death to him, results, neither he nor anyone for him has a right to recover from his employer, whose imperative safety order he violated, on the ground there was negligence of another employee causing the collision. The last chance doctrine cannot be applied. Same cases.

III.

(*a*) Even were the last chance doctrine applicable to a case of this kind, it is not applicable to this case because the conductor in the caboose did not know the engineer was violating the stop and wait order or that

there was an outstanding stop and wait order until the very moment of the collision, when it was too late to do anything. Actual knowledge of the conductor was pleaded, but not proved. The conductor, when the question was raised, asked for the orders, got them, and was reading them to see their contents, when the collision occurred (R. 25, 26, 98).

(*b*) In the Federal courts the last clear chance doctrine does not include cases where, by the exercise of ordinary care, defendant, through its conductor, might have discovered the person injured in peril in time to avoid the injury.

Wheelock et al. v. *Clay* (C. C. A., 8th, 1926), 13 Fed. (2d) 972, 973, and cases cited.

IV.

The last clear chance doctrine, if applicable to a case of this kind, is not applicable in the Federal courts, where, as here, the engineer's negligence was continuous and operative down to the moment of the injury.

Wheelock et al. v. *Clay* (C. C. A., 8th, 1926), 13 Fed. (2d) 972, 973, and cases cited;

St. Louis & S. F. Ry. Co. v. *Schumacher,* 152 U. S. 77, 81;

Kansas City S. R. Co. v. *Ellzey,* 275 U. S. 236, 241, 242;

Kinney v. *Chicago, Great Western R. Co.,* 17 Fed. (2d) 708, 709.

V.

The Arkansas trial and Supreme Courts, therefore, erred in giving, over defendant-petitioner's objections,

plaintiff-respondent's instructions Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, and 12, and each of them, and in refusing to give, petitioner excepting, defendant-petitioner's instructions Nos. 1, 3, 4, 4-*a*, 4-*aa*, 5, 6, and 7, and each of them, and in refusing to sustain defendant-petitioner's motion for new trial on said grounds, respondent's said instructions being on the last chance theory, and defendant-petitioner's instructions being on the theory plaintiff-respondent was not entitled to recover.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of Arkansas, sitting at Little Rock, Arkansas, commanding the said Court to certify and send to this Court, on the date to be designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Arkansas, had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court, as provided by law, and that the said judgment of the Supreme Court of the State of Arkansas be reversed by this Honorable Court, and for such further relief as may seem proper, and your petitioner will ever pray.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
By HAROLD R. SMALL,
Counsel.

N. F. LAMB.
A. L. ADAMS.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Arkansas is reported in — S. W. (2d) —. It is found on pages 97-104 of the Record. The date of the opinion and judgment of the Supreme Court of Arkansas affirming the judgment is November 9, 1931.

Petitioner's motion for a rehearing was overruled, and judgment became final December 7, 1931.

Section 2171, Crawford and Moser Digest of Statutes of Arkansas.

II.

Jurisdiction.

1. Petition for certiorari is made upon authority of Section 237-*b*, Judicial Code, as amended by the Act of February 13, 1925 (43 Stats. L. 936).

2. The date when the judgment became final was January 7, 1931, when petitioner's motion for rehearing was overruled (R. 106).

3. Respondent sued petitioner under the Federal Employers' Liability Act (35 Stats., L. 65, Ch. 149, U. S. C., Title 45, Sec. 51) (R. 1-4). Recovery was had under respondent's instructions Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, and 12 (R. 85-91).

The following grounds are relied upon as the basis of this Court's jurisdiction:

(*a*) The approval of the Supreme Court of Arkansas of the action of the trial court in refusing to give petitioner's instruction directing the jury to return a verdict for petitioner (R. 91, 97-104).

(*b*) In refusing to give petitioner's requested instructions Nos. 1, 3, 4, 4-*a*, 4-*aa*, 5, 6, 7, and each of them (R. 91-95).

(*c*) The affirming by the Supreme Court of Arkansas of the action of the trial court in all of these re-

spects, including the trial court's action in overruling petitioner's motion for new trial (R. 97-104) based on the foregoing errors of the trial court.

4. The cases believed to sustain the jurisdiction of this Court are:

Unadilla Valley R. Co. v. *Caldine*, 278 U. S. 130;
Davis v. *Kennedy*, 266 U. S. 147;
Great Northern Ry. Co. v. *Wiles*, 240 U. S. 144.

III.

Statement of Facts.

Having heretofore stated the case for petitioner in its petition for certiorari, the statement in the petition should for brevity be taken as the statement here.

IV.

Specification of Errors.

The trial court and the Supreme Court of Arkansas erred in holding that respondent was entitled to recover under the Federal Employers' Liability Act, and in the giving of each of respondent's instructions, in the refusal to give each of petitioner's instructions, and in the overruling of petitioner's motion for new trial on those grounds.

ARGUMENT.

The Decision of the Arkansas Supreme Court is Contrary to and in Conflict With Prior Federal Decisions.

The trial court and the Arkansas Supreme Court erred in refusing to give petitioner's instructions of-

fered at the close of all the evidence, which were to the effect that respondent was not entitled to recover from petitioner.

Respondent was not entitled to recover for the following reasons:

I.

The Arkansas trial and Supreme Courts erred in failing to follow controlling Federal decisions.

Recovery under the Federal Employers' Liability Act ought not to have been had where the fault of the employee, as here, is such that it would be a perversion of the Act to allow recovery.

The negligence of engineer Simpson in disregarding Train Order 104 to stop and wait on the siding at McNeil and his running his train into collision a mile further on with opposing train No. 18, having the right-of-way on the main track, is such conduct as precludes, under Federal controlling decisions, recovery for his injuries and death resulting from the collision.

His negligence is properly deemed the sole proximate cause of his injury and the doctrine of last clear chance on which recovery was allowed by the Arkansas courts on the theory the conductor, realizing the peril of the engineer, had time to stop *his* train, and so could have prevented the *two* trains from running into each other head-on has no place here.

Under controlling Federal decisions where there was a violation by the injured of like safety train orders with resulting collision it was held there could be no recovery even though there was also a failure of some other employee to perform his duty.

The following controlling Federal decisions construing the Federal Employers' Liability Act support the foregoing:

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Davis v. *Kennedy*, 266 U. S. 147;
Yadkin R. R. Co. v. *Sigmon*, 267 U. S. 577 (186 N. C. 519, 120 S. E. 56);
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Virginian R. Co. v. *Linkous* (C. C. A., 4th), 230 Fed. 88;
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Leading cases decided by the highest State courts are to the same effect:

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Where an engineer violates a stop and wait order of his employer railroad company, and collision, with injury or death to him, results, neither he nor anyone for him has a right to recover from his employer, whose imperative safety order he violated, on the ground there was negligence of another employee causing the collision. The last chance doctrine cannot be applied.

Same cases.

We shall refer briefly to the facts and holdings in but four cases of this Court.

In *Great Northern Railway Co.* v. *Wiles*, 240 U. S. 444, a freight train broke in two, due, as the Court assumes, to the company's negligence. Wiles was the rear brakeman. It was his duty to go back and flag the following train. He did not do so, and he was killed in the ensuing rear-end collision. His representatives brought the suit. In reversing the judgment for plaintiff, this Court said:

> "There is no justification for a comparison of negligences or the apportioning of their effect. * * * In the present case there was nothing to extenuate Wiles' negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy."

In *Frese* v. *Chicago, etc., R. Co.*, 263 U. S. 1, there was a collision at a grade crossing of two railroads.

One of the engineers was killed, and this action against his employer resulted. His contributory negligence was not involved. It was his duty under the rules to bring his train to a full stop and ascertain that the way was clear before proceeding. He brought his train to a stop, and proceeded, and was in collision. The other train was approaching from the fireman's side, and it was plainly the fireman's duty to keep watch for such approach and give notice to the engineer. The fireman had neglected this duty. Without that neglect, the collision would not have occurred. This Court denied any recovery on behalf of the engineer, and said:

> "Moreover the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice he could not escape this duty, and it would be a perversion of the Employers' Liability Act (45 U. S. C. A., Sec. 53) to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

In *Davis* v. *Kennedy,* 266 U. S. 147, Kennedy's representatives brought an action under the Federal Employers' Liability Act. Kennedy had been the engineer of train No. 4, going west from Nashville. He collided with train No. 1 coming east to Nashville. There were double tracks at Nashville uniting into one a little further west. Under train schedules, No. 1 had the right of way, and the crew of No. 4, including Kennedy, had standing positive orders not to pass on to the

single track unless they knew that No. 1 had finished its use and entered on the double track. Kennedy thought he saw No. 1 on the double track; so did the other members of his crew; but they were all mistaken. In the Tennessee court it was held that the other members of the crew, as well as Kennedy, were as much bound to look out for No. 1 as he was, and that therefore through them the railroad was negligent, and so under the Act became liable to Kennedy. It seems clear enough that there was negligence in this respect by the other employees, and that, if they had done their duty, the collision would not have occurred. This Court so assumes; but the judgment was reversed, the Court saying:

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary, as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more."

In *Unadilla Valley R. Co.* v. *Caldine*, 278 U. S. 139, a collision had taken place near Bridgewater, and Caldine, the conductor of train No. 2, had been killed. Caldine had the definite order that his train was to pass No. 15 in the Bridgewater yard, and that No. 15 was to take a siding there and allow No. 2 to pass. On this occasion, for some unknown reason, Caldine directed his train to go on beyond Bridgewater, and a

collision occurred. The Court below (246 N. Y. 365, 159 N. E. 172) had found the necessary negligence of the railroad through employees other than Caldine, because there had grown up a custom by which the conductor of No. 15, if he was a little late, would telephone that fact from his last station before Bridgewater, and the agent at Bridgewater would take this message and deliver it to Caldine, thus giving to him a further warning that he must obey the rule. On this occasion the telephone message was sent. The agent said he told the motorman of No. 2; the motorman denied this; but at any rate, through somebody's negligence, the customary special notice and warning did not reach Caldine. This Court held that there was no cause of action, saying:

> "The phrase of the statute, 'resulting in whole or in part,' admits of some latitude of interpretation and is likely to be given somewhat different meanings by different readers. Certainly the relation between the parties is to be taken into account. It seems to us that Caldine or one who stands in his shoes is not entitled as against the Railroad Company that employed him to say that the collision was due to any one but himself. He was in command. * * * He cannot hold the Company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was * * * brought about by his own acts. * * * A failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause of his act. Caldine had a plain duty and he knew it. The message would only have given

him another motive for obeying the rule that he was bound to obey."

These cases demonstrate that respondent was not entitled to recover.

In the case at bar it was the personal, primary and imperative duty of the engineer, Simpson, to obey the safety Train Order 104 and stop on the siding, and not proceed onto the main track until opposing train No. 18 had passed.

In *Atlantic Coast Line Railroad Co.* v. *Davis*, 279 U. S. 34, 39, a case that did not involve a collision of trains, but did involve the principle here in question, this Court said:

> "And the inevitable conclusion from all the evidence is that he voluntarily abandoned the safe position * * * and placed himself in a position of extreme danger * * * one of obvious danger, in which he would inevitably be struck if the boom made a full swing, unless he moved out of its path, and thereby through his own negligence as the sole and direct cause of the accident, brought on his own death. Under these circumstances there is plainly no ground upon which the liability of the Railroad Company may be predicated."
>
> "A failure to stop a man from doing what he knows that he ought not to do hardly can be called a cause of his act" (*Unadilla Valley R. Co.* v. *Caldine*, 278 U. S. 139, 142).

The sole cause of Simpson's death was his disregard of Order 104.

II.

The Arkansas courts allowed recovery on the last clear chance doctrine as an applicable doctrine in this case on the basis of the testimony to the effect that the conductor in the caboose "after discovering the peril of the engineer" negligently failed to stop his train before the collision and so failed to avoid the collision of the two trains, with the resulting injury and death to the engineer.

As shown, this doctrine is not applicable under the foregoing authorities.

Even were the last chance doctrine applicable to a case of this kind, it is not applicable to this case because the conductor in the caboose did not know the engineer was violating the stop and wait order, or that there was an outstanding stop and wait order until the very moment of the collision, when it was too late for him to do anything. Actual knowledge of the conductor was pleaded, but not proved. The conductor, when the question was raised, asked for the orders, got them, and was reading them to see their contents, when the collision occurred.

So, as a matter of fact, the conductor had not discovered the peril of the engineer before the collision. Under the Federal decisions in cases where the last chance doctrine is applicable, it is held that it is necessary for the claimant to prove actual knowledge, and not merely that the conductor should have known of the peril.

Wheelock et al. v. *Clay* (C. C. A., 8th, 1926), 13 Fed. (2d) 972.

Furthermore, the last clear chance doctrine as applied in the Federal courts is not applicable when, as here, the engineer's violation of his order continued as a proximate cause of the collision up to the moment of the collision.

St. Louis & S. F. Ry. Co. v. *Schumacher,* 152 U. S. 77;
Kansas City S. R. Co. v. *Ellzey,* 275 U. S. 236;
Wheelock et al. v. *Clay* (C. C. A., 8th, 1926), 13 Fed. (2d) 972, 973.

The Arkansas Supreme Court stresses the fact that the Arkansas case of *Missouri Pacific R. Co.* v. *Skipper,* 174 Ark. 1083, was left to stand, and certiorari was denied by this court, 276 U. S. 629. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case.

U. S. v. *Carver,* 260 U. S. 482, 490;
Atlantic Coast Line R. Co. v. *Powe,* 283 U. S. 401, 403, 404.

An examination of the Skipper case will show it to hold simply this: That Skipper, entirely free from negligence, was injured as the result solely of the negligence of a co-employee. That case therefore has no bearing here.

This case should be reversed because the controlling decisions of this Court and of the lower Federal courts deny any right of recovery in respondent.

We submit that the petition for the writ should be

granted, and that the judgment of the Supreme Court or Arkansas on final hearing should be reversed.

Respectfully submitted,

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